(3)

NO. 90-787

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

F. L. FARR,
PETITIONER

VERSUS

FEDERAL DEPOSIT INSURANCE
CORPORATION, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Summary Opinion of the Court of Appeals in this case violate Due Process requirements of the Fifth Amendment through its lack of specificity, unreasoned explanations and clearly erroneous conclusions?

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TABLE OF AUTHORITIES

STATUTES
STATE

OPINIONS BELOW

See page one of Petitioner's Brief.

JURISDICTION

See page one of Petitioner's Brief.

STATEMENT OF THE CASE

Please see pp. 2-8 of Petitioner's Brief for a full statement of the case. The Solicitor General, in page 3 of his Opposition succinctly states several areas of the Trial and Appellate errors of the Courts below.

ARGUMENT

As we have noted in our Brief and as the Solicitor General seeks to minimize, a due process case must be considered both in its parts and as a totality. Matthews v. Eldridge, 424 U.S. 319 (1976); Morrissey v.

Brewer, 408 U.S. 471 (1972). Any clear examination of this case will show that due process was not afforded Petitioner because of blatant and unexplained errors that require correction on a due process basis. E.g. Taylor v. McKeithen, 407 U.S. 191 (1971); see also similar issues in a criminal context, Ylst v. Nunnemaker 904 F.2d 473 (1990), (U.S. Supreme Court Docket No. 90-68). In our case an examination of the decisions of the Trial Court and the cryptic opinion of the Court of Appeals only serve to create confusion as to their rulings since they are unexplained or conclusory, and when conclusory, clearly wrong and only raise more questions that highlight the denial of due process in this case.

The Solicitor General maintains that the Court explained its reasons and adopted the District Court's orders. Any reading of

these documents only illustrate Petitioner's points. Let us examine the points raised by the Solicitor General in support. (Brief in Opposition, pp. 4-6).

The Solicitor General cites Taylor v. McKeithen, at p. 194, for the proposition that the Courts of Appeals should have wide latitute in their decisions about how or if to write opinions. That is, of course, obvious, but it does not thereby absolve them from the simple requirements of providing a means of review. Taylor v. McKeithen, also at 194; see also Minnesota v. National Tea Co., 309 U.S. 551 (1990). In this case the blatantly incorrect, inexplicable and conclusory statements of the Trial Court were adopted by the Court of Appeals in an even more tacit opinion and we are left amazed at the result. The Solicitor General posits that the conclusory statements of the Trial Court

adopted by the Circuit) are sufficient to give the opinion viability. This is unsupportable in this case. As shown in Petitioner's Brief the conclusions cited on p. 3-5 of the Brief in Opposition are clearly wrong or misconstrue Texas law without explanation.

The Court below stated erroneously that there is no private right of action under the Texas Bank escheat statute because it only discusses suit by the Texas Attorney General, Tex. Prop. Code §73.003, §74.705. This is to ignore, misconstrue and change Texas law without warning or explanation. Texas has long had an implied cause of action for those who are within the ambit of protection of a statute. Litton Indus. Products, Inc. v. Gammage, 644 S.W.2d 170 (Tex. Civ. App. - Houston, 14th Dist. 1982); Texas & Pacific Rwy v. Rigby, 241 U.S. 33 (1906). This unexplained contravention of

established state law by an opinion without explanation requires explanation - explanation only to be had by a grant of certiorari either correcting this error or sending it back for correction. If the Federal Courts have, without explanation or warning, decided to change Texas law does not due process require both an explanation and a warning to other litigants?

With regards to the contract issue of the absolute bar to liability found by the Trial Court and Court of Appeals, we have shown that their bizarre statements that no reason or authority has been cited by Petitioner as to why that portion of the contract is not binding is, alone one of the frightening and persuasive statements supporting a denial of due process analysis. Petitioner has cited numerous facts and theories supporting this conclusion (as stated in our Brief pp. 26-31, etc.). The

Trial Court, which was presented with same, did not rule in the Summary Judgment context that these issues were insufficient or incorrect but simply that there were none! How can such an opinion be adequately reviewed, yet the Court of Appeals merely restated the Trial Court findings? We do not know whether the Courts below ignored the proposed evidence, found it inadequate or whatever. This statement denies Petitioner his due process, under these facts, by making it impossible to appeal since the only ruling of the Court is not explained and is clearly wrong. In any event the ruling was also wrong since numerous cases and facts were cited showing that Texas had provided for the supercession of such exculpatory clauses when the bank, for its own purposes and under the agreement between the parties, has taken possession of these goods. In a summary judgment context

the Court's ruling ignoring these verified facts and Texas rules is a startling denial of due process. The reasons cited immediately above would also apply to the actions of the Courts below in concluding, without evidence from the bank, that the pledge agreement was completed by merely returning the keys to the safety deposit box when the Bank had total control and access for some time pursuant to a security/ bailment agreement. Under these circumstances, how can the conclusory opinion stand, especially in a summary judgment context, which rules that this delivery of keys alone constituted completion?

Finally, and perhaps most strangely, the Court of Appeals sua sponte found that there were "unwritten agreements" involved which absolved the FDIC under D'Oench, Duhne & Co. v. FDIC, 315 U.S. 447 (1942). First

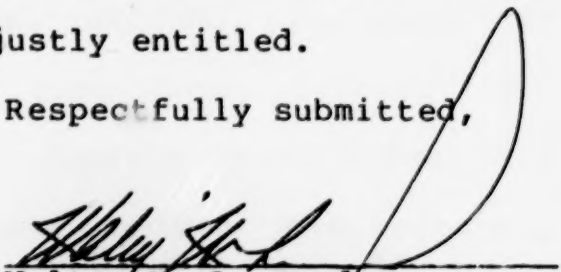
of all, no party had raised this issue, and when the opportunity to address it was requested, such was ignored, (see Petitioner's Brief pp. 35-38). No one, least of all Petitioner, knows what unwritten agreements are involved here. Any examiner looking at the Bank on takeover (for that is the concern of D'Oench) would have found that this case was already in the courts and all pertinent claims had been made. D'Oench is concerned with unknown agreements that might lessen the value of the institution yet might not be available for an examiner on reviewing the books on takeover. This is not analogous to a pending lawsuit yet that may be what the court said. We cannot tell and have been denied any reasonable opportunity to contest this because neither we nor anyone else can determine from the cursory opinion what the Court meant. We were even left with the

frightening thought that such ruling may be de rigeur in all FDIC cases, perhaps also explaining the summary treatment given this claim. In a due process context we must exhaustively scrutinize such unexplained actions. Morrissey, op. cit. Perhaps one of the oddest assertions in this whole remarkable chain of events occurs at Note 2, Page 5 of the Brief in Opposition. In attempting to defend the action of the Court of Appeals concerning unwritten agreements he note that we can hardly complain about the citation of a case holding such agreements unenforceable! We both can and do complain since some such "unwritten" agreements, existing without expression in the mind of the Court, have been used without explanation to deny Petitioner his day in Court. Surely fundamental justice and fair dealing (i.e. due process) requires some sort of reviewable expression from the Court.

CONCLUSION

For all these reasons the Writ of Certiorari should be granted. This Writ could be either to bring the case before this Honorable Court, or, as has been done before, to direct the Courts below to reconsider the matter and explain and support what has been done. Petitioner requests this and such other relief as to which he may be justly entitled.

Respectfully submitted,



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DATED: February 20, 1991.

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RESPONDENT

PROOF OF SERVICE

I, WALTER W. LEONARD, do swear or declare that on this date, February 20, 1991, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached Reply Brief to Brief in Opposition for Petition for a Writ of Certiorari on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid:

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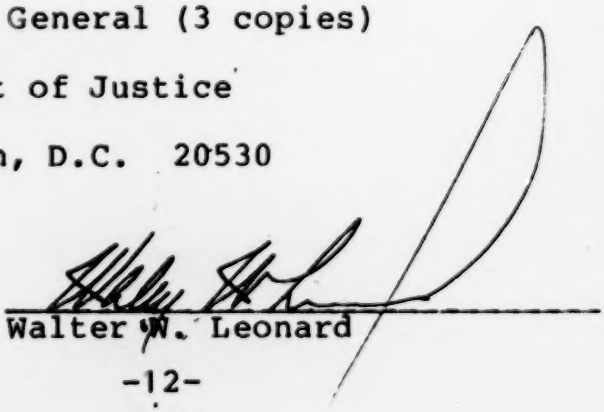

Walter W. Leonard

Subscribed and sworn to before me on this February 20, 1991.

Marie McDonald Bass
Notary Public in and
for the State of Texas

My Commission Expires:

1/30/93